FOLLOWING MISAPPROPRIATED PROPERTY INTO ITS PRODUCT.

IF a trustee wrongfully sells the trust-*res* or exchanges it for other property, the *cestui que trust* may charge him as a constructive trustee of the money or newly acquired property, or of any subsequent product of either;[1] or, if he prefers, he may enforce an equitable lien to the amount of the misappropriation upon any property in the hands of the wrongdoer, which is the traceable product of the original trust-*res*.[2] If, at the time of relief given, the new property is worth less than the original trust-*res*, the *cestui que trust*, after exhausting his lien, will have a personal claim against the trustee for the difference. If the new property is worth as much as or more than the original trust-*res*, the enforcement of the constructive trust or of the equitable lien will be a full satisfaction of all claims founded on the breach of the express trust. When the value of the new property exceeds that of the original trust, the *cestui que trust*, by enforcing the constructive trust, makes a profit by the trustee's breach of the express trust, and this profit may be very large, as when the trust fund is invested in land or corporate shares which advance rapidly, or, to put the most conspicuous instance of great profit, when the trustee invests trust money in taking out a policy of life insurance which becomes payable soon afterwards by the death of the insured. The *cestui que trust* takes the whole of the insurance money, although ten times as much as the trust money misappropriated.[3]

[1] If the wrongdoer after exchanging the original trust-*res* for other property buys it back again, the *cestui que trust* has the option of charging him as trustee of the old *res* or the newly acquired property. It was thought at one time that the Statute of Frauds barred the claim of the *cestui que trust* to land acquired by the misuse of the trust fund. Newton *v.* Preston, Pr. Ch. 103; Kirk *v.* Webb, Pr. Ch. 163; Herron *v.* Herron, Pr. Ch. 163; Free. Ch. 246 s. c.; Kinder *v.* Miller, Pr. Ch. 171, 2 Vern. 240 s. c.; Halcot *v.* Marchant, Pr. Ch. 168; Hooper *v.* Gyles, 2 Vern. 480; Cox *v.* Bateman, 2 Ves. 19. But these cases were long ago overruled, — Lane *v.* Dighton, Amb. 409; Ames, Cas. on Trusts, 1st ed., 323, 325, n. 1.

[2] "The beneficial owner . . . is entitled at his election either to take the property or to have a charge on the property for the amount of the trust money." Per Jessel, M. R., *Re* Hallett, 13 Ch. D. 696, 709.

[3] Lehman *v.* Gunn, 124 Ala. 213; Shaler *v.* Trowbridge, 28 N. J. Eq. 595; Holmes *v.* Gilman, 138 N. Y. 369; Dayton *v.* Claflin Co., 19 N. Y. App. Div. 120; Roberts *v.* Winton, 100 Tenn. 484 (*semble*); Bromley *v.* Cleveland Co., 103 Wis. 562, 567 (*semble*).

This excess above full compensation is not given to the *cestui que trust* by reason of any merit on his part. It comes to him as a mere windfall. Public policy demands that the faithless trustee should not retain any advantage derived from his breach of trust. Hence the wholesome rule that whatever a trustee loses in the misuse of the trust fund he loses for himself, and whatever he wins, he wins for the beneficiary.[1]

If this rule is to be applied consistently, it follows that if a trustee buys property partly with his own money and partly with trust money, the *cestui que trust* is entitled to that proportion of the property bought which the trust money used bears to the entire purchase money. The authorities are numerous to this effect,[2] although in several of them this result was assumed as a matter of course without argument. But in two states, Massachusetts and Ohio, the *cestui que trust* is allowed only a lien upon the new property to secure the amount of the misused trust fund.[3]

In several other cases the remedy given was that of a lien.[4] But in these cases the question of an alternative right to a proportionate part of the new property was not raised by the counsel nor considered by the court. In truth, the *cestui que trust* should be given the option of a proportional part of the new property or

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[1] A pledgee of shares who wrongfully sells them for $5000 and afterwards buys them back for $3000 and gives them to the pledgor upon payment of the debt must also surrender his profit of $2000. Langton *v.* Waite, 6 Eq. 165, 173.

[2] Docker *v.* Somes, 2 Myl. & K. 655; *Re* Oatway, [1903] 2 Ch. 356; Nat. Bank *v.* Ins. Co., 104 U. S. 54, 68; *Re* Mulligan, 116 Fed. Rep. 715, 717; Barrett *v.* Kyle, 17 Ala. 306; Tilford *v.* Torrey, 53 Ala. 120, 122; Walker *v.* Elledge, 65 Ala. 51 (*semble*); Kelley *v.* Browning, 113 Ala. 420; Howison *v.* Baird, 40 So. Rep. 94 (Ala. 1906); Byrne *v.* McGrath, 130 Cal. 316; Elizalde *v.* Elizalde, 137 Cal. 634 (*semble*); Bazemore *v.* Davis, 55 Ga. 505; Harris *v.* McIntyre, 118 Ill. 275; Reynolds *v.* Sumner, 126 Ill. 58; Fansler *v.* Jones, 7 Ind. 277; Bitzer *v.* Bobo, 39 Minn. 18; Morrison *v.* Kinston, 55 Miss. 71; White *v.* Drew, 42 Mo. 51; Bowen *v.* McKean, 82 Mo. 594; Shaw *v.* Shaw, 86 Mo. 594; Jones *v.* Elkins, 143 Mo. 647; Crawford *v.* Jones, 163 Mo. 578; McLeod *v.* Venable, 163 Mo. 536; Johnston *v.* Johnston, 173 Mo. 91, 115; Bohle *v.* Hasselbroch, 64 N. J. Eq. 334; Dayton *v.* Claflin Co., 19 N. Y. App. Div. 120; Lyon *v.* Akin, 78 N. C. 258; Wallace *v.* Duffield, 2 S. & R. (Pa.) 521; Kepler *v.* Davis, 80 Pa. 153; Rupp's App. 100 Pa. 531; Lloyd *v.* Woods, 176 Pa. 63; Sheetz *v.* Neagley, 13 Phila. 506; Green *v.* Haskell, 5 R. I. 447; Watson *v.* Thompson, 12 R. I. 467; Kaphan *v.* Torrey, 58 S. W. Rep. 909 (Tenn. 1899); Moffatt *v.* Shepard, 2 Pinn. (Wis.) 66.

[3] Bresnihan *v.* Sheehan, 125 Mass. 11; Reynolds *v.* Morris, 17 Oh. St. 510.

[4] Lane *v.* Dighton, Amb. 409; Price *v.* Blakemore, 6 Beav. 507; Hopper *v.* Conyers, L. R. 2 Eq. 549; *Re* Pumfrey, 22 Ch. D. 255, 260; Graves *v.* Pinchback, 47 Ark. 470; Humphreys *v.* Butler, 51 Ark. 351; Nat. Bank *v.* Barry, 125 Mass. 20; Munro *v.* Collins, 95 Mo. 33; Day *v.* Roth, 18 N. Y. 448; Bryant *v.* Allen, 54 N. Y. App. Div. 500 (affirmed 166 N. Y. 637).

a lien upon it, as may be most for his advantage.[1] If the new property appreciates, it will be for his interest to claim a proportionate share of it. If it depreciates, he will naturally prefer to claim a lien upon it to the extent of the misused trust money. In two states, New Jersey and Pennsylvania, a trustee, who makes a purchase partly with his own money and partly with a trust fund, is treated with extreme severity. In New Jersey he loses not only the share of profit attributable to the trust money, but also that due to his own money, the *cestui que trust* being entitled to the whole of the new property, subject to a lien in favor of the trustee to the amount of his own contribution.[2] In Pennsylvania, if the product of the joint funds is in the form of shares in different companies, some of which have appreciated, while others have depreciated, the *cestui que trust* may take his proportion of the purchase from the shares which have proved the most profitable.[3]

The principles thus far considered apply to all fiduciaries, not only to trustees, who have the legal title to the misappropriated property, but to bailees, guardians, and the like, who have possession but not title.[4] Although in a few early American cases the courts declined to permit the owner of property to recover its product, as a constructive trust, if the misappropriation was by any person other than a fiduciary,[5] it is now well settled that one who has been deprived of his property by fraud, by theft, or by any wrongful conversion, may charge the fraudulent vendee, the thief, or other wrongful converter as a constructive trustee of any property received in exchange for the misappropriated property.[6]

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[1] This option was allowed in Bitzer *v.* Bobo, 39 Minn. 18; Crawford *v.* Jones, 163 Mo. 578; Green *v.* Haskell, 5 R. I. 447.

[2] Bohle *v.* Hasselbroch, 54 N. J. Eq. 334

[3] Norris's App., 71 Pa. 106.

[4] *Re* Hallett, 13 Ch. D. 696, 709, 710.

[5] Pascoag Bank *v.* Hunt, 3 Edw. 583; Campbell *v.* Drake, 4 Eden 94; Rain *v.* McNary, 4 Humph. (Tenn.) 356; Cunningham *v.* Wood, 4 Humph. (Tenn.) 417; Hawthorne *v.* Brown, 3 Sneed (Tenn.) 462.

[6] *Fraud.* Smith *v.* Atwood, You. 607; Taub *v.* McClelland Co., 10 Col. App. 190; Farwell *v.* Homan, 45 Neb. 424 (*semble*); Bank of America *v.* Pollock, 4 Edw. 215; American Co. *v.* Fancher, 145 N. Y. 552; Converse *v.* Sickles, 146 N. Y. 200 (*semble*); Reynolds *v.* Ætna Co., 28 N. Y. App. Div. 591; Menz *v.* Beebe, 102 Wis. 342.

Theft. Cattley *v.* Loundes, 34 W. R. 139; *Re* Hulton, 39 W. R. 303, 8 Morrell 69 s. c.; Pirtle *v.* Price, 31 La. An. 357; Nat Bank *v.* Barry, 125 Mass. 20; Nebraska Bank *v.* Johnson, 51 Neb. 346; Lamb *v.* Rooney, 100 N. W. Rep. 40 (Neb. 1904);

At one time an action for money had and received was not allowed against a converter for the proceeds of the sale of the converted chattel.[1] But this doctrine was overruled two centuries ago.[2] There seems to be no good reason why one who has disseised another of his land and sold it, should not be similarly liable to the disseisee for the proceeds of the sale in an action for money had and received. But the right to such an action was denied in Massachusetts in 1843.[3] Nor has the writer discovered any decision to the contrary. This Massachusetts decision, it is submitted, should not be followed. But be that as it may, it is believed that the courts of equity will not hesitate to give a disseisee the benefit of any property acquired by the disseisor in exchange for the land of the disseisee. Accordingly, the rule as to following misappropriated property into its product in the hands of the wrongdoer may be formulated as follows: If property of any kind is misappropriated in any manner by one who knows it to belong, either at law or in equity, to another, the true owner may charge the wrongdoer as a constructive trustee of any property in his hands which is the traceable product of the misappropriated *res*, or, if he prefers, he may enforce an equitable lien upon this traceable product to the extent of the value of the misappropriated *res*.[4]

If the misappropriated *res*, or its product, has been transferred by the wrongdoer, the rights of the defrauded owner to assert a trust or lien against the transferee will vary accordingly as the latter is a *mala fide* transferee, a *bona fide* donee, or a *bona fide* purchaser.

The *mala fide* transferee, obviously, is in the same case as the original wrongdoer.[5] If he gets the legal title from the wrongdoer he will hold it as the wrongdoer held it. If he gets merely the pos-

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Newton *v.* Porter, 69 N. Y. 133 (affirming 5 Lans. 416); Reynolds *v.* Ætna Co., 28 N. Y. App. Div. 591, 601.

Other wrongful conversion. La Comité *v.* Standard Bank, 1 C. & E. 87; *Re* Woods, 121 Fed. Rep. 599; Graves *v.* Pinchback, 47 Ark. 470 (*semble*); Humphreys *v.* Butler, 51 Ark. 351.

[1] Philips *v.* Thompson, 3 Lev. 191 (1675).

[2] Lamine *v.* Dorell, 2 Ld. Raym. 1216; Hitchin *v.* Campbell, 2 W. Bl. 827.

[3] Brigham *v.* Winchester, 6 Met. (Mass.) 460.

[4] It was decided in Lister *v.* Stubbs, 45 Ch. D. 1, that a fiduciary, who accepted a bribe from a third person, and invested the money in securities which appreciated, although liable to his beneficiary for the amount of the bribe could not be compelled to surrender the securities. It is not easy to see the reason for this discrimination in favor of the bribe taker.

[5] Wheeler *v.* Kirtland, 23 N. J. Eq. 13.

session from a thief or other converter, he is himself a converter and becomes a trustee of any property which he may receive in exchange for the converted *res*.

The *bona fide* donee may or may not acquire the legal title to the *res* conveyed to him by the wrongdoer. If he gets the title, its acquisition, it is true, is honest; but its retention, after knowledge of his grantor's wrong in conveying it, would be dishonest, for he, a volunteer, would thereby enrich himself at the expense of the defrauded *cestui que trust*. From the moment of his discovery of his grantor's fraud, therefore, the *bona fide* donee is in the same position as to the *res* in his hands as if he had at that moment acquired the property *mala fide*.[1]

If, however, the *bona fide* donee should dispose of the property before discovering his grantor's fraud, he is not accountable for its value to the *cestui que trust*. Not at common law, for he has committed no legal tort in dealing with property which by the common law was his own. Not in equity, for he has committed no equitable wrong in parting with a legal title which he believed to be free from any equitable incumbrance. If his transfer was gratuitous, he is not liable in any way to the defrauded *cestui que trust*.[2] If, however, his transfer was for value received, the situation is changed. If he keeps the value received he, a volunteer, is making a positive gain at the expense of the *cestui que trust*. He must, therefore, either surrender the value received or account to the *cestui que trust* for the value of the misappropriated trust-*res*. But he should have the option of doing the one or the other. If the value received was less than the value of the *res* transferred by him, or if the newly acquired property has depreciated below the value of that *res*, the donee does all that can, in justice, be required of him by giving up what he received in exchange for his transfer.[3] He has acted honestly and makes no profit. If, on the other hand, the newly acquired property appreciates, and the donee prefers to give the *cestui* the value of the misappropriated *res*, the latter having received full compensation for what was taken from him cannot

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[1] Standish *v.* Babcock, 52 N. J. Eq. 628; Laws *v.* Williams, 56 N. J. Eq. 553.

[2] Blake *v.* Metzgar, 150 Pa. St. 291; Bonesteel *v.* Bonesteel, 30 Wis. 516. He may also buy the property from a subsequent *bona fide* purchaser and keep it. Mast *v.* Henry, 65 Iowa 193.

A striking illustration of this principle is the emancipation by an innocent donee of a slave conveyed to him by a fraudulent donee.

[3] Robes *v.* Bent, Moo. 552; Wheeler *v.* Kirtland, 23 N. J. Eq. 13 (*semble*); Truesdell *v.* Bourke, 29 N. Y. App. Div. 95 (affirmed 161 N. Y. 634).

rightfully demand more. The donee, it is true, may, in this case, profit by the misconduct of the wrongdoer. But the retention of this profit by the *bona fide* donee is not forbidden by the principle of public policy which is properly invoked against the *mala fide* grantee of the wrongdoer. Even if the innocent donee cannot make reparation in value, because of his insolvency, he ought not to be obliged to give up to the defrauded *cestui que trust* the whole of the newly acquired property if that is worth more than the misappropriated trust-*res*. Full justice will be done if the *cestui que trust* is given a lien upon the newly acquired property to the extent of the value of the original trust-*res*. The surplus should go to the general creditors of the insolvent donee.

If the *bona fide* donee does not acquire the title to the misappropriated *res*, as when he receives it from a thief or other converter, he is himself, although morally innocent, guilty of a conversion, and must either surrender the converted chattel to the true owner or make reparation in value. Furthermore, if after discovering the title of the true owner, he should transfer the converted *res* in exchange for other property, he would be chargeable as a constructive trustee of the newly acquired property for the benefit of the true owner. Is he also chargeable as a constructive trustee, if his transfer was before his discovery of the tort of his transferor? There seems to be no decision upon this point. It is conceived, however, that equity should not create a constructive trust in this case, if the morally innocent donee is able and willing to make reparation in value for his technical tort. Even his insolvency should not give the defrauded owner more than a lien upon the newly acquired property, if its value exceeds that of the converted *res*, for compensation should be the limit of recovery for a tort, if the defendant acted in good faith.

If a *bona fide* donee of a thief or other converter may keep the product of the converted *res*, in case he is ready to pay the value of the latter to the true owner, a *bona fide* purchaser from the wrongdoer must have the same privilege. And there is authority to this effect. In the well-considered case, Dixon *v.* Caldwell,[1] a military bounty warrant for 160 acres was stolen from the plaintiff, and, after the thief had forged the plaintiff's indorsement, sold to the defendant, a purchaser for value without notice of the theft or forgery.

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[1] 15 Oh. St. 412, approved in Mack *v.* Brammer, 28 Oh. St. 508. See to the same effect, Fletcher *v.* McArthur, 117 Fed. Rep. 393.

The defendant then surrendered the warrant to the government and obtained a patent vesting in him the title to 160 acres of land. The plaintiff sought to charge the defendant as a constructive trustee of this land, but his bill was dismissed, the court being of the opinion that the plaintiff's remedy by an action at law for the conversion of the certificate was adequate and that it would be inequitable to deprive the *bona fide* purchaser of his legal title to the land. If the *bona fide* purchaser is unable, because of insolvency, to make reparation in value for his conversion, he, like the *bona fide* donee under similar circumstances, should hold the newly acquired property subject to a lien in favor of the owner of the converted *res* to the extent of the value of the latter.

It follows from the Ohio decision, that, if the defendant, instead of exchanging the warrant for the patent to the land, had sold it, he would not have been liable to the plaintiff in an action of assumpsit for money had and received. There are, however, several decisions to the contrary.[1] But, it should be observed, nothing turned in these cases upon the form of action, since the amount recoverable was practically the same whether the action was assumpsit for money had and received, or trover for the value of the converted warrant. A case may be put, however, in which the defendant would be unfairly prejudiced, if the action of assumpsit for the proceeds of the sale were allowed. Suppose the defendant to have bought the warrant July 1, 1899, and to have sold it June 1, 1905. If actions of tort and contract are barred in six years, the plaintiff's action for conversion would be barred after July 1, 1905, but if he may also charge the defendant for the proceeds of the sale on June 1, 1905, that action would not be barred until June 1, 1911.[2] It is submitted that the *bona fide* purchaser should not be subjected to the hardship of this prolonged liability.

It is hardly necessary to add that, if the *bona fide* purchaser acquired from the wrongdoer the title to the misappropriated property, he will hold it free and clear from all equitable claims

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[1] Bobbett *v.* Pinkett, 1 Ex. D. 368, 372; Kleinwort *v.* Comptoir, [1894] 2 Q. B. 157; Indiana Bank *v.* Holtsclaw, 98 Ind. 85; Buckley *v.* Second Bank, 35 N. J. Eq. 400; Johnson *v.* First Bank, 6 Hun (N. Y.) 124. But see *contra*, Baltimore Co. *v.* Burke, 102 Va. 643.

[2] Ivey *v.* Owens, 28 Ala. 641; Lamb *v.* Clark, 5 Pick. (Mass.) 193; Robertson *v* Dunn, 87 N. C. 191.

of the defrauded *cestui que trust*, who must look to his faithless trustee alone for relief.

It has been assumed thus far that it was possible to find in the hands of the wrongdoer, the *mala fide* grantee, the *bona fide* donee or *bona fide* purchaser, some specific property which was unmistakeably the product of the original misappropriated *res*. But, in truth, the bulk of the litigation upon this subject has grown out of the difficulty of finding the traceable product of the misappropriated property. If the misappropriation is a sale and the proceeds are invested in the purchase of a tract of land, or a jewel, or in a bond, or note, or are deposited in a bank to the credit of the depositor, the case is simple. The wrongdoer is clearly a constructive trustee of the land, jewel, bond, note or claim against the bank. Suppose, however, that the proceeds of the sale are 100 gold eagles, and that these coins, which are obviously held in trust for the victim of the misappropriation, are put into a bag by the wrongdoer with 100 gold eagles of his own. It is impossible to identify the trust coins. Has the trust, therefore, disappeared? No. Since one gold eagle is just like another, the defrauded *cestui que trust* may say one half of the 200 gold eagles in the bag is held in trust for him, while the other half belongs to the wrongdoer. Suppose, now, that the wrongdoer spends 50 of the gold eagles for his own benefit. Is the *cestui's* claim reduced to 75 or is he still entitled to 100 of the 150 gold eagles remaining? It is well settled that he has the right to 100. This result is commonly explained by saying that the wrongdoer must be presumed to have intended to use his own share of the mixed fund, rather than the share of the *cestui que trust*.[1] This is, of course, a pure fiction. A thief is not likely to manifest such consideration for the victim of his theft. Furthermore, even if it could be proved that the thief actually intended to spend the *cestui que trust's* share first, the result would be the same. The *cestui que trust* would still be entitled to his 100 gold eagles. The true explanation, it is submitted, is this. The *cestui que trust* has an option, the moment the coins are mixed in the bag, to claim either a moiety of the coins, or a charge upon the whole to the amount of the coins originally held in trust for him, that is, 100. On this theory so long as 100 gold eagles remain in the bag, the *cestui que trust* is safe. But if the wrongdoer should spend

[1] *Re* Hallett, 13 Ch. D. 696, 712, 720.

150 of the coins, the charge would be only upon the 50 remaining even though the wrongdoer should afterwards put 50 coins in the bag.

The same reasoning applies to the case in which the wrongdoer deposits trust funds together with money of his own in a bank. If, for example, he deposits $1000 of trust funds and $1000 of his own, the *cestui que trust* may at his election hold the wrongdoer as a trustee of a moiety of the $2000 claim against the bank, or he may enforce a charge upon the claim to the amount of $1000, and this charge or lien will fully protect the *cestui que trust* so long as the amount to the credit of the wrongdoer does not drop below $1000, no matter how many checks are drawn upon the bank and regardless of fresh deposits. But if the deposit account falls, at any time, below $1000, or is all drawn out, the security of the *cestui que trust* diminishes *pro tanto* in the one case and vanishes in the other case.[1] Nor will the security be increased or reappear, by reason of subsequent deposits of his own money by the wrongdoer.[2]

Let us suppose again that the wrongdoer after depositing $1000 of the trust money with $1000 of his own, draws out $1000 with which he buys shares in a company or other property which remains in his hands. The *cestui que trust* may charge the wrongdoer as a trustee of a moiety of the remaining claim against the bank for $1000 and also of a moiety of the shares or other property bought with the $1000 drawn out.[3] It seems clear that he should also have a right to enforce a lien for the $1000 upon both the remaining deposit and the shares or other newly bought property, if he finds it for his interest to do so.[4] In New Jersey, however,

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[1] These statements are supported by the decisions. *Re* Hallett, 13 Ch. D. 696 (overruling Pennell *v.* Deffell, 4 De G. M. & G. 372, and Brown *v.* Adams, 4 Ch. 764); Gibert *v.* Gonard, 540 L. J. Ch. 439; Spokane Co. *v.* First Bank, 68 Fed. Rep. 979, 981 (*semble*); *Re* Swift, 108 Fed. Rep. 212, 113 Fed. Rep. 203; *Re* Mulligan, 116 Fed. Rep. 715, 717, 721; *Re* Graff, 117 Fed. Rep. 343; Elizalde *v.* Elizalde, 137 Cal. 634; Windstanley *v.* Second Bank, 13 Ind. App. 544, 547; Morse *v.* Satterlee, 81 Ia. 491; Englar *v.* Offutt, 70 Md. 78, 86; Drovers Bank *v.* Roller, 85 Md. 495, 499 (*semble*); Ellicott *v.* Kuhl, 60 N. J. Eq. 333, 336; Importers Bank *v.* Peters, 123 N. Y. 272; Blair *v.* Hill, 50 N. Y. App. Div. 33; Greene's Est., 20 N. Y. Supp. 94; Northern Co. *v.* Clark, 3 N. Dak. 26, 30; State *v.* Foster, 5 Wyo. 199, 215.

[2] *Re* Hallett, 13 Ch. D. 696, 731 (*semble*); Mercantile Co. *v.* St. Louis Co., 99 Fed. Rep. 485; *Re* Mulligan, 116 Fed. Rep. 715, 719 (*semble*); Cole *v.* Cole, 54 N. Y. App. Div. 37; *Re* Youngs, 5 Dem. Sur. 141.

[3] *Re* Oatway, [1903] 2 Ch. 856; Lincoln *v.* Morrison, 64 Neb. 822. But see *contra*, Bevan *v.* Citizens Bank, 19 Ky. Law Rep. 1260; Bright *v.* King, 20 Ky. Law Rep. 186.

[4] Lamb *v.* Rooney, 100 N. W. Rep. 410 (Neb. 1904).

the court, invoking the fiction that the wrongdoer, in drawing on the mixed deposit account, must be presumed to draw out his own money first, would give to the *cestui que trust* in the case supposed no claim upon the shares or other newly bought property.[1]

There is another class of cases illustrating the confusion of funds. A bank receives money on general deposit, knowing that it has no right to receive it, either because of its known insolvency or because the depositor is an official who is prohibited by law from so depositing the money he holds as an official. The bank fails soon afterwards, having in the meantime received and paid out divers sums of money. The money wrongfully received was mixed, of course, with the other money of the bank. Must the depositor, or the body which he represents, come in with the general creditors, or is he entitled to a preference? The answer depends upon the amount of money continuously in the bank from the time of the bank's wrongful receipt of the deposit. The moment the $1000 was mixed with the other money of the bank, the depositor became *cestui que trust* of that proportion of all the money then in the bank, which $1000 bore to the total money, or he might claim a lien to the amount of $1000 upon all the money in the bank. If the total amount of money in the bank was continuously from the moment of the deposit, up to the time the bank closed its doors, equal to or more than $1000, the depositor would be paid in full. If at any time the total amount dropped below $1000, the depositor's security would be reduced *pro tanto*, and would not be increased by any subsequent receipt of money of its own.[2] The

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[1] Standish *v.* Babcock, 52 N. J. Eq. 628.

[2] Wasson *v.* Hawkins, 59 Fed. Rep. 233; Massey *v.* Fisher, 62 Fed. Rep. 958; Boone Bank *v.* Latimer, 67 Fed. Rep. 27; Cleveland Bank *v.* Hawkins, 79 Fed. Rep. 29; Indep. Dist. *v.* Beard, 83 Fed. Rep. 5 (reversed in 88 Fed. Rep. 375, but because of a different view of the facts); Merch. Bank *v.* School Dist., 94 Fed. Rep. 705; Quinn *v.* Earle, 95 Fed. Rep. 728, 731; Richardson *v.* N. O. Co., 102 Fed. Rep. 780, 785; Richardson *v.* Oliver, 105 Fed. Rep. 277; *Re* Swift, 108 Fed. Rep. 212, 215; Woodhouse *v.* Crandall, 197 Ill. 104 (reversing 99 Ill. App. 552); Windstanley *v.* Second Bank, 13 Ind. App. 544, 554; Sherwood *v.* Central Bank, 103 Mich. 109; Wallace *v.* Stover, 107 Mich. 190; Board *v.* Wilkinson, 119 Mich. 655; Bishop *v.* Mahoney, 70 Minn. 238, 240; Shields *v.* Thomas, 71 Miss. 260, 270; State *v.* Bank of Commerce, 54 Neb. 725; State *v.* Bank of Commerce, 61 Neb. 181; Lincoln *v.* Morrison, 64 Neb. 822; Arnot *v.* Bingham, 55 Hun (N. Y.) 553; People *v.* Merch. Bank, 92 Hun (N. Y.) 159; *Re* Holmes, 37 N. Y. App. Div. 15 (affirmed 159 N. Y. 532); Kimmel *v.* Dickson, 5 S. Dak. 221; Piano Co. *v.* Auld, 14 S. Dak. 512; Bank *v.* Weems, 69 Tex. 489; Burnham *v.* Booth, 89 Wis. 362, 368; Slater *v.* Foster, 5 Wyo. 199.

Phila. Bank *v.* Dowd, 38 Fed. Rep. 172, contains a *dictum* against the right of the *cestui que trust*, but this opinion was expressly rejected in Massey *v.* Fisher,

mixing of the depositor's money and the bank's money in the vaults of the bank is not to be distinguished from the mixing by the wrongdoer who puts his own gold eagles with those of another in a bag, or, as in Kirby *v.* Wilson,[1] in his pockets.

Let us now suppose that the misappropriated *res* cannot be traced into any specific land, chattels, bank deposit, or into the money in a bank, but that the court is convinced that the fund for distribution among the creditors of the wrongdoer is larger than it would have been but for the misappropriation. Should the victim of the misappropriation come in ahead of the general creditors? Obviously he cannot establish any trust or lien for want of any specific *res*. But in justice he should be treated as a preferred creditor as to the excess of the actual fund for distribution above what it would have been if the misappropriation had not been made. The general creditors should not make a profit by their debtor's misuse of another's property and at the expense of the defrauded owner. There seems to be no decision on this point. But this is not surprising, for in practice it will be extremely difficult to prove the excess in the fund for distribution without tracing the misappropriated *res* into some specific product.

In a few jurisdictions the true owner is given a preference over the general creditors of the wrongdoer upon the mere proof that the latter had the benefit of the misappropriated *res*, even though it is impossible to prove that the fund for distribution among the general creditors is, at the time of the preference allowed, larger than it would have been but for the misappropriation.[2] But the

62 Fed. Rep. 958, and is not likely to be followed. In People *v.* City Bank, 96 N. Y. 32, on the other hand, the court seems to have given the *cestui que trust* more than his just claim.

[1] 98 Ill. 240.

[2] First Bank *v.* Hummel, 14 Col. 259; Hopkins *v.* Burr, 24 Col. 502; Banks *v.* Rice, 8 Col. App. 217 (but see MeClure *v.* La Plata Co., 19 Col. 122; Holden *v.* Piper, 5 Col. App. 71); Davenport *v.* Plow Co., 80 Ia. 722 (but see Indep. Dist. *v.* King, 80 Ia. 497; Jones *v.* Chesebrough, 105 Ia. 303; Ewell *v.* Clay, 107 Ia. 56; Moore *v.* Chesebrough (1900, Ia.), 81 N. W. Rep. 469; Bradley *v.* Chesebrough, 111 Ia. 126; Sioux Co. *v.* Fribourg, 121 Ia. 230); Peak *v.* Ellicott, 30 Kan. 637; Reeves *v.* Pierce, 64 Kan. 502 (but see Burrows *v.* Johntz, 57 Kan. 778; Travellers Co. *v.* Caldwell, 59 Kan. 156; Kansas Bank *v.* First Bank, 62 Kan. 786); Carley *v.* Graves, 85 Mich. 483 (but see Board *v.* Wilkinson, 119 Mich. 655); Harrison *v.* Smith, 83 Mo. 210 (overruling Miles *v.* Post, 76 Mo. 426); Stoller *v.* Coates, 88 Mo. 514; Evangel. Synod *v.* Schoeneich, 143 Mo. 652; Pundman *v.* Schoeneich, 144 Mo. 194 (but see Bircher *v.* Walther, 163 Mo. 461); Griffin *v.* Chase, 36 Neb. 328; Capital Bank *v.* Coldwater Bank, 49 Neb. 786; State *v.* Midland Bank, 52 Neb. 1 (but see State *v.* Bank of Commerce, 54 Neb. 725).

allowance of a preference under such conditions is unjust to the general creditors. If the product of the true owner's *res* is still traceable in the assets of the wrongdoer, in the form of land, chattels, a bank deposit, or the money of a bank, its surrender to the true owner is eminently just. The creditors are left just where they would be if there had been no misappropriation. If the true owner's *res* was used in paying one of the creditors, the true owner may fairly claim to be subrogated to that creditor's claim,[1] in which case, also, the dividends of the other creditors would not be affected by the misappropriation. The same result is reached if, without subrogation, the true owner is allowed to prove ratably with the other creditors. But to go further and give the true owner a preference over all the general creditors means an unfair reduction of the dividend of the other creditors. If the true owner's *res* has been squandered, the dividend of the other creditors must be less because of the right of the true owner to prove his claim. But here, too, it would be gross injustice to pay the true owner in full, and thereby diminish still further the dividend of the general creditors. The authorities are nearly unanimous against this unjust preference.[2]

James Barr Ames.

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[1] Cotton *v.* Dacey, 61 Fed. Rep. 481; Jefferson *v.* Edrington, 53 Ark. 345; Standish *v.* Babcock, 52 N. J. Eq. 628, in which cases the subrogation was to the right of a creditor secured by a mortgage.

[2] Multnomah Co. *v.* Oreg. Bank, 61 Fed. Rep. 912 (disapproving San Diego Co. *v.* Cal. Bank, 52 Fed. Rep. 59); Spokane Co. *v.* First Bank, 68 Fed. Rep. 979; City Bank *v.* Blackmore, 75 Fed. Rep. 771; Metrop. Bank *v.* Campbell Co., 77 Fed. Rep. 705; St. Louis Asso. *v.* Austin, 100 Ala. 313; Bank *v.* U. S. Co., 104 Ala. 297; Winston *v.* Miller, 139 Ala. 259; Ober Co. *v.* Cochran, 118 Ga. 396; Lanterman *v.* Travers, 174 Ill. 459; Seiter *v.* Mowe, 182 Ill. 351, 81 Ill. App. 297; Windstanley *v.* Second Bank, 13 Ind. App. 544; Robinson *v.* Woodward, 28 Ky. Law Rep. 1142; Englar *v.* Offutt, 70 Md. 78; Drovers Bank *v.* Roller, 85 Md. 495; Little *v.* Chadwick, 151 Mass. 109; Bishop *v.* Mahoney, 70 Minn. 238; Twohy *v.* Melbye, 78 Minn. 357; Shields *v.* Thomas, 71 Miss. 260; Lincoln *v.* Morrison, 64 Neb. 822 (overruling earlier Nebraska cases); Perth Co. *v.* Middlesex Bank, 60 N. J. Eq. 84; Ellicott *v.* Kuhl, 60 N. J. Eq. 333; O'Callaghan's App. 64 N. J. Eq. 287; *Re* Cavin, 105 N. Y. 256; *Re* North Bank, 60 Hun (N. Y.) 91; Atkinson *v.* Rochester Co., 114 N. Y. 168; People *v.* American Co., 2 N. Y. App. Div. 193; Cole *v.* Cole, 54 N. Y. App. Div. 37; *Re* Hicks, 170 N. Y. 195; Northern Co. *v.* Clark, 3 N. Dak. 26; Ferchen *v.* Arndt, 26 Ore. 121; Muhlenberg *v.* N. W. Co., 26 Ore. 132; *Re* Assignment, 32 Ore. 84; Freiberg *v.* Stoddard, 161 Pa. 259; Lebanon Bank, 166 Pa. 622; Slater *v.* Oriental Mills, 18 R. I. 352; Arbuckle *v.* Kirkpatrick, 98 Tenn. 221; Nonotuck Co. *v.* Flanders, 87 Wis. 237 (overruling the earlier Wisconsin cases); Burnham *v.* Barth, 89 Wis. 362; Thuemmler *v.* Barth, 89 Wis. 381; Henika *v.* Heinemann, 90 Wis. 478; Gianella *v.* Momsen, 90 Wis. 476; Stevens *v.* Williams, 91 Wis. 58; Dowie *v.* Humphrey, 91 Wis. 98; Hyland *v.* Roe, 111 Wis. 361; State *v.* Foster, 5 Wyo. 199, 215.